

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1915.

No. 2847. **257**

CELIA CHAMBERS, APPELLANT,

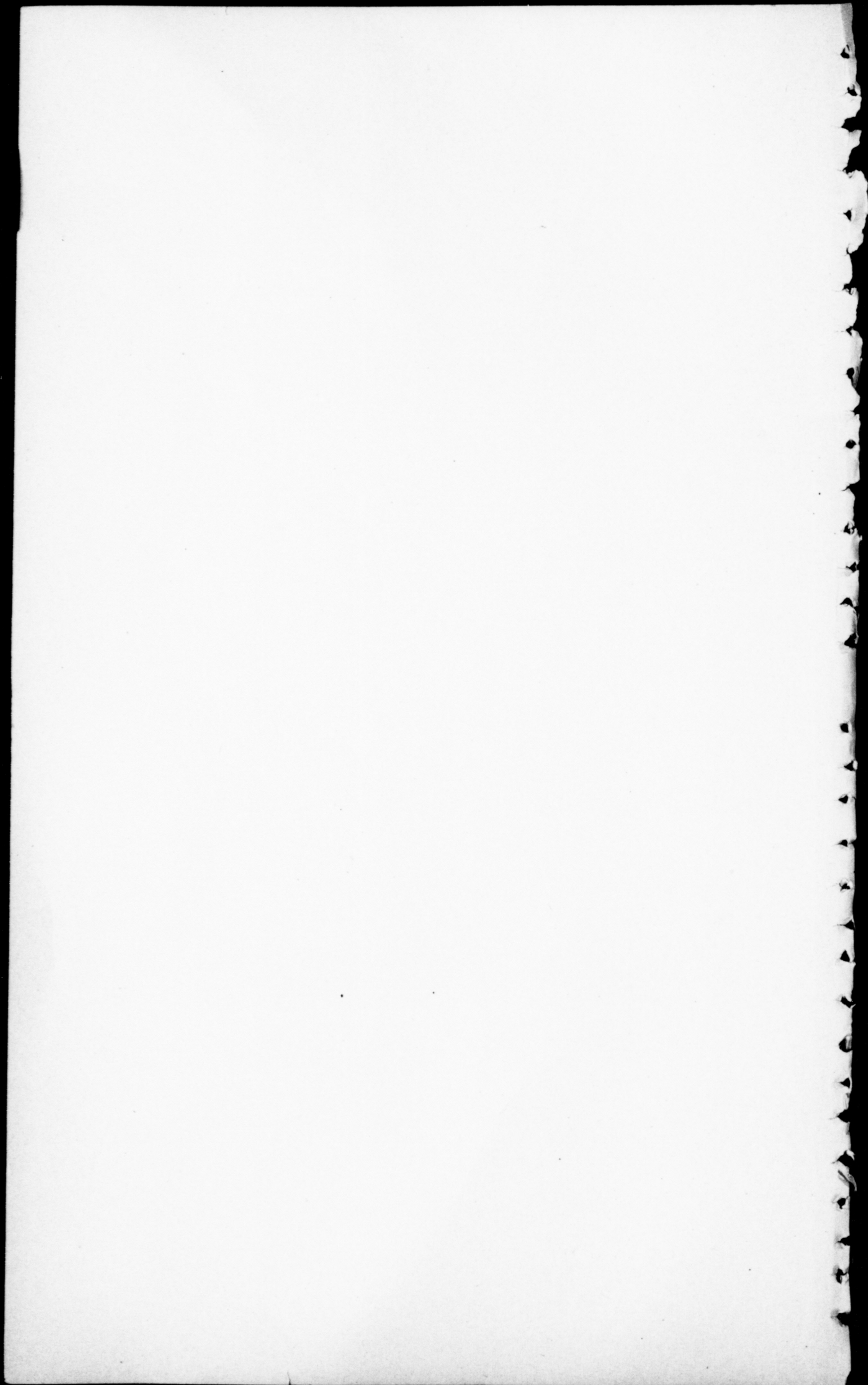
vs.

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 29, 1915.

PRINTED AUGUST 9, 1915.



Court of Appeals of the District of Columbia.

OCTOBER TERM, 1915.

No. 2847.

CELIA CHAMBERS, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA (A MUNICIPAL CORPORATION), APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original. Print	
Caption	<i>a</i>	1
Declaration (first count)	1	1
Amended second count to declaration	4	3
Plea	7	5
Memorandum: Verdict for plaintiff for one cent.	8	5
Motion for new trial	8	5
Motion for new trial overruled; judgment on verdict ordered; judgment; appeal noted	9	6
Memoranda: Appeal bond approved and filed; bill of exceptions submitted	10	6
Order making bill of exceptions part of record	10	6
Assignment of errors	10	6
Designation of record	11	7
Clerk's certificate	13	7
Bill of exceptions	14	8
Testimony of Celia Chambers	14	8
L. D. Wilson	15	9
Janet Snape	16	9

	Original.	Print
Testimony of Robert S. Strobel.....	17	10
Elizabeth J. Riley.....	17	10
Mary C. O'Connor.....	18	11
Annie Burton	19	11
Milton L. Landvoight.....	19	12
Annie Burns	19	12
Lillian C. Boyer	20	12
J. F. Hartnett.....	20	13
Richard F. Hartnett.....	21	13
Mrs. Richard D. Hartnett.....	21	13
Mrs. J. A. Compton.....	21	13
J. A. Compton.....	22	14
Henry A. Allen.....	22	14
W. W. L. Morris.....	22	14
George R. Biddle.....	23	14
G. V. Rector.....	23	15
Mrs. Eleanor E. Grove.....	24	15
J. S. Pilcher.....	24	15
Alexander Thompson	24	15
William G. Davis.....	25	16
John S. Miller.....	25	16
Dr. Edward W. Burch.....	25	16
Thomas J. Fischer.....	26	17
Clifford Lanhan	26	17
Celia Chambers (recalled).....	27	17
Lillian C. Boyer (recalled).....	27	18

Court of Appeals of the District of Columbia

No. 2847.

CELIA CHAMBERS, Appellant,
vs.
THE DISTRICT OF COLUMBIA, &c.

a Supreme Court of the District of Columbia.

At Law. No. 56624.

CELIA CHAMBERS, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA (a Municipal Corporation), Defendant.
UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed February 10, 1914.

In the Supreme Court of the District of Columbia.

At Law. No. 56624.

CELIA CHAMBERS, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA (a Municipal Corporation), Defendant.

First Count. The plaintiff, Celia Chambers, sues the defendant, a Municipal Corporation, duly created and existing under and by virtue of the laws of the Congress of the United States of America, for that, whereas; heretofore; to wit: on the 23rd day of November, A. D., 1913, and for a long time prior thereto, the said District of Columbia, as such municipal Corporation had control over and

charge of the streets, highways, avenues and sidewalks of the said District of Columbia; and it was the duty of the said defendant corporation to so prepare, use, operate, control, superintend and keep in repair, the said streets, highways, avenues and sidewalks of the said District of Columbia, that they would be reasonably safe for persons having occasion to or being obliged to use the same.

And plaintiff avers that it was the duty of the said defendant corporation to so superintend, use, operate, control and repair, one of its sidewalks, to wit: the sidewalk on the north side of E Street, between 8th & 9th Streets, S. W., in the District of Columbia, 2 that it would be safe for foot passengers and people being obliged to or having occasion to pass over the same.

And plaintiff avers, that on to wit: the said 23rd day of November, 1913, the said defendant corporation had permitted the said sidewalk, negligently, carelessly and improperly to become unfit and unsafe for the use of foot passengers or pedestrians being obliged to pass over the same, or having occasion to use the same, in that, there was an elevation extending across the said sidewalk in front of premises 815-E Street, S. W., in a direction from North to South, of to wit; three (3) or four (4) inches in height, which said elevation or improper condition of the said sidewalk was well known to the defendant corporation, its servants, agents and representatives.

That the said defendant corporation permitted the said elevation or improper condition of the said sidewalk to exist, owing to the negligence, carelessness and mismanagement of the defendant corporation, its servants and agents.

And plaintiff avers, that on to wit: the said 23rd day of November, 1913, she had occasion to pass over the said sidewalk, and about the hour of 6-45 p. m., owing to the poor, inadequate and insufficient lighting of said street at that time and place, she was unable to see, and did not see the said obstruction and fell over the same and thereby sustained various and numerous bruises over a large portion of her body. That both of her arms and both of her elbows were badly bruised and injured, and she also sustained serious and great and permanent injuries to both of her knees, and she sustained 3 other wounds and bruises by reason thereof too numerous to mention. So that plaintiff was confined to her bed for the space of, at least, two weeks, and has been confined to the house from the said 23rd day of November, 1913, until the present time, except when she was taken out of her house to her physician.

And plaintiff avers she was obliged to spend a large sum of money, to wit: — Dollars, in securing the necessary medical and surgical attention, in and about being cured of her many and various wounds and bruises received as aforesaid. And plaintiff avers that all of her said injuries were caused by the negligence, carelessness and mismanagement of the said defendant corporation, its agents and servants in permitting the said elevation to exist at that place, in the street, and not removing the same.

And plaintiff avers that prior to her falling over the same, others had also fallen and some had been injured thereby, so that the defendant corporation through its said servants and agents had full

knowledge of the dangerous character of the said sidewalk. But, notwithstanding, its dangerous condition, had not taken any means to remove the elevation or to enclose and protect the same so that passersby would not fall over and be injured thereby. And on account of the negligence, carelessness and mismanagement of the servants and agents of the said defendant corporation as aforesaid, plaintiff was injured and therefore, brings this suit. And plaintiff claims the sum of Ten thousand (\$10,000.00) Dollars damages, besides the costs of this suit.

* * * * *

MICHAEL C. O'BRIEN,
EDWARD L. GIES,
Attorneys for Plaintiff.

4

(Endorsed.)

Let this suit be filed without the prepayment of costs.

THOS. H. ANDERSON, *Justice.*

Amended Second Count to Declaration.

Filed March 25, 1915.

* * * * *

Leave of the court being first had and obtained, the plaintiff hereby files an amended second count to her declaration heretofore filed herein.

Second Count. The plaintiff, Celia Chambers, further sues the defendant a Municipal Corporation, duly created and existing under and by virtue of the Laws of the Congress of the United States of America, for that, whereas; heretofore; to wit: on the 23rd day of November, A. D., 1913, and for a long time prior thereto, the said District of Columbia, as such Municipal Corporation had control over and charge of the streets, highways, avenues and sidewalks of the said District of Columbia; and it was the duty of the said defendant corporation to so prepare, use, operate, control, superintend and keep in repair the said streets, highways, avenues and sidewalks of the said District of Columbia, that they would be reasonably safe for persons having occasion to or being obliged to use the same.

5 And plaintiff avers that it was the duty of the said defendant corporation to so superintend, use, operate, control and repair one of its sidewalks, to wit: the sidewalk on the North side of E Street, between 8th & 9th Streets, S. W., in the District of Columbia, that it would be safe for foot passengers and people being obliged to or having occasion to pass over the same.

And plaintiff avers that prior to the said 23rd day of November, A. D., 1913, the said defendant corporation having control over the said sidewalk, permitted through the negligence and carelessness of its servants, agents and employees, a tree to remain on the South edge

of said sidewalk in such a position and condition that its roots extended under the said sidewalk and caused an elevation in the same in front of premises No. 815-E Street S. W., in a direction from South to North, and that said elevation was to wit: three (3) or four (4) inches in height. And thereby the said sidewalk became unfit and unsafe for the use of foot passengers and pedestrians being obliged to pass over the same, or having occasion to use the same. Which said elevation or improper condition of the said sidewalk was well known to the defendant corporation its servants, agents and representatives.

That the said defendant corporation permitted the said elevation or improper condition of the said sidewalk to exist, owing to the negligence, carelessness and mismanagement of the defendant corporation, its servants and agents.

And plaintiff avers, that on to wit: the said 23rd day of November, 1913, she had occasion to pass over the said sidewalk, and about the hour of 6-45 p. m., owing to the poor, inadequate and insufficient lighting of said street at that time and place, she was unable to see, and did not see the said obstruction and fell over the same and thereby sustained various and numerous bruises over a large portion of her body. That both of her arms, and both of her elbows were badly bruised and injured, and she also sustained serious and great and permanent injuries to both of her knees, and she sustained other wounds and bruises by reason thereof too numerous to mention. So that plaintiff suffered great pain and anguish and was confined to her bed for the space of at least, two weeks, and has been confined to the house from the said 23rd day of November, 1913, until the present time, except when she is taken out of her house to her physician.

And plaintiff avers she was obliged to spend a large sum of money, to wit: — Dollars, in securing the necessary medical and surgical attention in and about being cured of her many and various wounds and bruises, received as aforesaid. And plaintiff avers that all of her said injuries were caused by the negligence, carelessness and mismanagement of the said defendant corporation, its agents and servants, in permitting the said elevation to exist at that place in the street, and not removing the same.

And she further avers, that prior to her falling over the said elevation, others had also fallen and some had been injured thereby, so that the defendant corporation through its said servants and agents had full knowledge of the dangerous character of said sidewalk, but, notwithstanding its dangerous condition, had not taken any means to remove the elevation or to enclose and protect the same, so that passersby would not fall over and be injured thereby. And on account of the negligence, carelessness and mismanagement as aforesaid, plaintiff was injured and therefore, brings this suit. And plaintiff claims the sum of Ten thousand (\$10,000.00) Dollars damages, besides the costs of this suit.

MICHAEL C. O'BRIEN AND
EDWARD L. GIES,
Attorneys for Plaintiff.

Plea.

Filed March 5, 1914.

* * * * *

The defendant, the District of Columbia, for a plea to the declaration filed in the above entitled cause, and to each and every count thereof, says that it is not guilty in manner and form as alleged therein.

CONRAD H. SYME,
Corporation Counsel;
ROGER J. WHITEFORD,
Assistant Corporation Counsel,
Attorneys for the District of Columbia.

8

Memorandum.

April 19, 1915.—Verdict for Plaintiff for One Cent.

Motion for New Trial.

Filed April 20, 1915.

* * * * *

Now comes the plaintiff by her attorneys and moves the Court to set aside the verdict rendered in the above entitled cause, and grant a new trial for the following reasons, to-wit:

First. Because the verdict of the jury was contrary to the evidence.

Second. Because the verdict of the jury was against the evidence and against the weight of the evidence.

Third. Because the amount awarded by the jury was not justified by the evidence, and was not in accordance with the evidence in the case.

Fourth. Because the verdict of the jury was contrary to the instructions of the Court as to the law governing the case.

EDWARD L. GIES,
MICHAEL C. O'BRIEN,
Attorneys for Plaintiff.

To Mr. R. J. Whitford, Attorney for Defendant:

9 Take notice that we will call the above motion to the attention of the Court on Saturday, the 24th day of April, A. D., 1915, at 9:30 o'clock A. M., or as soon thereafter as counsel can be heard.

EDWARD L. GIES,
MICHAEL C. O'BRIEN,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

SATURDAY, May 1, 1915.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * *

This cause coming on for hearing upon the motion of the plaintiff for a new trial, the same having been heard, it is considered that said motion be, and hereby is, overruled and judgment on verdict is ordered.

Therefore it is considered that the plaintiff herein recover against the defendant herein the sum of One (1) Cent, being the money payable by said defendant to the plaintiff by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

The plaintiff by her Attorneys, in open Court, in the presence of Counsel for defendant, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs on said appeal is hereby fixed in the sum of One hundred dollars (\$100).

10

Memoranda.

May 19, 1915.—Appeal bond approved and filed.

June 11, 1915.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia.

WEDNESDAY, June 23, 1915.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * *

The Court having this day signed the bill of exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof during the trial.

Assignment of Errors.

Filed June 24, 1915.

* * * * *

The court erred as follows:

First. In admitting the evidence of the witness, Geo. V. Rector in regard to the map of the street and in overruling plaintiff's
 11 motion to strike out all of the testimony relating to said map, and the entire testimony of the said witness.

Second. The court erred in not setting aside the verdict of the jury rendered in this cause for the reason that the said verdict was con-

trary to the evidence, against the weight of the evidence, and contrary to the instructions of the court.

MICHAEL C. O'BRIEN AND
EDWARD L. GIES,
Attorneys for Plaintiff.

Designation for Record.

Filed June 24, 1915.

* * * * *

The clerk will please include in the transcript for record on appeal in this cause the following:

1. The first count of the declaration and the amended second count.
2. The plea.
3. Memorandum of settling and filing the bill of exceptions and the bill of exceptions.
4. Verdict.
5. The motion for a new trial.
6. The judgment.
7. The appeal in open court and order fixing penalty of bond.
8. Bond approved and filed.
9. Assignment of errors.
- 12 10. This designation.

MICHAEL C. O'BRIEN AND
EDWARD L. GIES,
Attorneys for Plaintiff.

13 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 12, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 56624 at Law, wherein Celia Chambers is Plaintiff and The District of Columbia, (A Municipal Corporation) is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of June, 1915.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

14 In the Supreme Court of the District of Columbia.

At Law. No. 56624.

CELIA CHAMBERS, Plaintiff,
vs.
DISTRICT OF COLUMBIA, Defendant.



Bill of Exceptions.

Be it remembered that this cause came on for trial on the 13th day of April 1915, before Justice Gould and a jury. Whereupon the plaintiff offered evidence tending to prove as follows:

1. Mrs. CELIA CHAMBERS, the plaintiff stated that she lived at 122-6th Street Northeast, and on the evening of November 23rd, 1913, was going to see a sick person in the southwest and at 6.30 P. M. was on the north side of the pavement, between 8th and 9th on E Street southwest, going west. It was quite dark and two other ladies were with her and she fell near a big old tree in front of 815 E Street Southwest, that she fell right forward and sprained her left hand and knee, broke her teeth, cut her chin, and forehead. That she stumbled over an elevation in the pavement. She did not examine it at the time, but went back three or four weeks afterwards and found the place where she had fallen. She stated that the bricks were forced up by the roots of an old tree and formed a regular little hill in the pavement which extended for three or four feet from the tree, across the pavement in a northwesterly direction. That there was also a depression on the east side of this root. That she went around to a friend's house and went home about ten o'clock. That her knees were scratched and black and blue, that there was nothing the matter with her walking before the accident, but since the accident she could not walk on some days at all. She was walking better the day she was in court, than usual. That she was internally injured, and had a very bad case of bladder trouble, and her back hurt her something awful, as a result of the injuries. She is taking treatment for it now, and she has to sit down to everything she does, and can do little of anything. She had none of this trouble before the accident, that she does not sleep well.

On cross examination Witness stated that she was with Miss Riley and her daughter, Mrs. Walker. That she went around to
15 Miss Riley's, and was helped up by the two women, who were with her. After she had gotten up, she said to the young gentleman, who came down from the porch, "That is a bad place." and he said, "Yes," That man's name was Hartnett. She did not see the place at the time because her head was going around, and she was shaking so she did not see anything.

Witness denied that she had ever had varicose veins, or that she was operated on for them, that she had been treated by Dr. Wilson seven years ago for a little ulcer on her ankle. It was not a varicose

ulcer. He thought it was poisoned from a black stocking, that there was the only place, that she was never treated for rheumatism or for varicose veins. When she was able on Nov. 26, 1913, she went down to Dr. Wilson's office, as he had electric batteries there, and he treated her for a condition caused by the fall.

2. Dr. L. D. WILSON, stated that he had been a practicing physician for twenty-four years, in the District of Columbia. That Mrs. Chambers called upon him at his office, on the 26th of November 1913. He found both knees bruised, swollen and sprained. That Mrs. Chambers complained of her back being wrenched and torn. On examination he found the back sensitive to the touch, down in the region of the spine, that her elbows were scratched superficially. That the knees were bruised and sprained, that he found looseness of the semi-lunar cartilage. That he gave her electrical treatments from the 26th of November to the 22nd of December, 1913. That the last examination he made of her was in November 1914, at Mrs. Chambers' house in connection with Dr. Burch. That he found both knees were still defective?

"There was not a complete function of either of the knees, she was not able to stand erect, or bend her knees properly. On this occasion there were no bruises, only possibly some slight swelling. That he thinks the injuries to the knees are permanent. That she complains of some trouble with the bladder, for which he treated her." That he treated her some six or seven years ago for slight abrasion on her ankle, but never treated her for varicose veins. That she was bruised and sprained about the spine, the spinal ligaments were sprained and she was very sensitive to the touch. That
16 the spine was sensitive to the touch when he ceased treating her and that the knees were painful.

On cross examination witness stated that he treated her with electricity, by the application of heat and light, for the purpose of removing congestion, that this is the generally accepted treatment. That the trouble with Mrs. Chambers' knees was that she sprained them, and that the sprained condition still continues. That spraining is simply a stretching of the ligaments, and the treatment was to remove the congestion, that before this accident Mrs. Chambers walked all right, that there was no evidence of varicose veins on Mrs. Chambers' limb, according to the recollection of witness.

Q. They may be there in spite of the fact that you do not recall them? A. That is possible.

3. Mrs. JANET SNAPE who gave testimony that she was a registered nurse and chiropractor and instructor in anatomy and physics at the Washington school of Chiropractics. That she has a license to practice in Virginia. She became acquainted with Mrs. Chambers when she came to their office for examination, as to her knees, she was having pain in both knees, and a painful condition in walking, especially in bending her knees. That she and her husband found considerable pain in the knees in changing the position especially, and she had pains in the knee when it was at rest. The knee was prac-

tically paining her all the time, that they were treating her for the spine. That they found a sort of sub-sensation in the lumbar region of the spine. They treated her for the lameness of the knee and manipulated it and gave her nine or ten treatments of the spine called adjustments. She stated that it was quite possible that some of the cartilages of the knee had become dislodged, by the strain of the fall and if the cartilages are dislodged she is quite sure that the injury might be permanent.

On cross examination the witness stated that she found a painful condition in the knee which is abnormal and that there must be a dislodgment of the organism of the knee or there would be no pain. They treated the spine with their hands by moving the bones of the spine. That the hands and fingers are trained so that they can tell by the feel when one bone is further away than the other. In the case of the knee, it is a complicated joint and might easily be
17 thrown out of place, and a derangement in the knee would cause a sub-sensation in the spine, would cause an impeded blood supply and an improper nerve supply to that part. That she was not able to cure Mrs. Chambers for the reason that the semi-lunar cartilage was displaced and they could not put back the semi-lunar cartilage because it has been torn loose. That she was not licensed to practice in the District of Columbia.

4. ROBERT S. STROBEL, testified that he was a plumber and his place of business was 702 E Street Southwest, where it had been for fifteen years. That he was familiar with the pavement on the north side of E Street, west of the alley, between 8th and 9th Streets, Southwest. That the condition of the pavement was bad from the tree roots, lumps and hollows, generally from the alley west, more so along close to the alley. That the pavement had been replaced, and a granolithic pavement laid in the summer of 1914, and that the bad condition had existed prior to the renewal of the pavement for at least two years, that the trouble with the pavement was caused by the tree pushing the bricks up, the tree roots extend and push the bricks up and that gives a rise and a hollow on the other side.

5. Mrs. ELIZABETH JOSEPHINE RILEY testified she lived at 415-9th Street, Southwest, for thirty-three years, had been a school teacher since 1869. That she had known Mrs. Chambers since she was a little girl, and was with her on the evening of November 23rd, 1913. They had been visiting and were going back to her house along the North side of E Street Southwest between 8th and 9th. That Mrs. Chambers, Mrs. Chambers' daughter, and grand-daughter were with her. When they reached this portion of E Street, Mrs. Chambers suddenly fell, Miss Riley helped her up and someone came over and very politely offered to assist. Mrs. Chambers went to Mrs. Riley's house, who got some dioxygen at the drug store for her to wash her face, as she had been cut on the chin. It was in the evening about 7 o'clock, Mrs. Chambers fell all in a heap. That it was very dark; and the street was very poorly lighted. Mrs. Chambers stayed until 9 o'clock then she went home.

18 Witness stated that she looked at the pavement frequently afterwards at the place where she fell. Mrs. Chambers was on the outside, and witness was on the inside. Where Mrs. Chambers fell there was quite an elevation as well as a depression. The elevation was caused by the roots of the tree forcing the bricks up and then the frost in the ground and other things causing them to settle. She fell a little bit east of No. 815 E Street S. W., that witness had been over this portion of the pavement repeatedly and that this section of the pavement, west of the alley, was in bad condition. That witness fell herself there some years ago, having been tripped by a rise in the pavement that the depression was on the east side of the elevation and that the bricks when forced up formed a sort of a pyramid, the roots of the tree forcing the bricks up three or four inches above the level of the pavement and the depression was about as much below the general level of the pavement. She saw Mrs. Chambers, the following summer and noticed how terribly she limped. She had never limped prior to the accident. On cross examination witness stated that the bricks stuck up out of the ground about four inches, the depression was about four inches deep, and that it was about eight inches from the bottom of the depression to the top of the bricks, that there were trees where Mrs. Chambers fell.

6. MARY C. O'CONNOR, testified that she lived at 937 E Street southwest for sixteen years, that she is well acquainted with the condition of the pavement, west of the alley on the north side of E Street, between 8th and 9th. That she had a bad fall herself near the corner of 9th from the effect of the roots of the trees. That the pavement was raised from the effect of the roots of the tree and seemed to be in bad condition generally. That she fell at the first tree from the corner of 9th and E. That the roots of this tree caused the pavement to rise and caused a very uneven place which would be liable to trip anyone, that it extended in a north and south direction three or four feet. That this trouble was from the root of the tree and the pavement was lifted four or five inches. It was quite a raise. That she fell two years before the trial in April of 1913, and it had existed prior to that.

19 On cross-examination witness stated that when she fell Mr. Allen came running to her assistance. Witness had a cut sleeve and a sprained arm in the fall and could not walk for two days, and that after this she walked out in the street to avoid this bad place and witness fell near the tree.

7. Mrs. ANNIE BURTON, testified that she lived at 415-9th Street, Southwest, since the middle of August 1912. That she knows the pavement on the north side of E Street, west of the alley, between 8th and 9th streets, "because it gave her a mighty hurt there." She was on her way to the drug store to get some medicine and struck the bottom of her foot with something and fell. That there was a tree and it seemed the bricks came up so (illustrating.) After she fell she got up when she could and went home, to her sick daughter. This was in November of 1912, and was on the north side of E Street,

between the alley and 9th Streets. There was a tree there and she fell along about where the tree was. That it was near about where the middle house is, that the bricks came up across the pavement. The next morning she went down to see if she had lost any money and see what it was that gave her such a fall. She said "I won't come here any more," and she hasn't been on that corner since, and won't go on that corner. She fell between seven and eight o'clock, it was quite dark. There was a tree on the corner, that she is still suffering with the foot and hasn't been able to stand on it since.

8. MILTON J. LANDVOIGHT, testified that he is a skilled laborer in the Bureau of Engraving and Printing, and during the years of 1912 and 1913 passed frequently along the pavement between 8th and 9th on E Streets Southwest, and had lived down in that neighborhood for twenty years, and left the neighborhood in November of 1911, that the pavement from the alley west of 9th Street on the north side was very bad, rough and rocky-like. That it had existed for a few years prior to November 1913. The trouble with the pavement was caused by the roots of the trees protruding up and forcing the bricks up and making the hollows and hills there.

9. Miss ANNIE BURNS testified she has lived at 421-9th St. Southwest about twenty-seven years, that she had occasion almost
20 every day to pass along E Street between 8th and 9th Sts. on the north side of the street. That it was improved in July 1914. That she refers to the pavement west of the alley on the north side. That the trouble with the pavement was little depressions and every rain storm the rain used to collect there and she would rather walk in the middle of the street than on the sidewalk, because the middle of the street was better than the sidewalk. That the unevenness of the pavement was caused by the large trees, the roots would damage the bricks in some way and that it existed as far back as she remembered, and that she had to pass almost every day to go down to take the car to go to her office.

On cross examination she stated that in November 1913, there were large oak trees there, she remembered that there were trees there that caused this unevenness in the surface and she remembers the water and * * * particularly going out in the middle of the street to avoid the puddles of water.

10. Mrs. LILLIAN CECILIA BOYER, testified that she is a daughter of Mrs. Chambers and lives with her. That in November of 1913, her mother was a well strong women and had always been. There was trouble about her walking since November 23rd 1913. Her mother has never had a day without suffering since then and she has been unable to do ordinary work, she cannot stand, she cannot walk, and whenever she wants to do anything she has to take a chair and sit down to it. That her limping has been since the fall. That she treated her mother, put applications to her mother's legs, fixed her face and did everything that she wanted her to do for her, that after the accident she seemed to suffer a great deal of pain and is suffer-

ing all the time, that she rubs her knees at least every other night with olive oil, and does everything she can to loosen them up and give her relief.

Thereupon the defendant offered evidence in substance as follows:

First. J. F. HARTNETT, testified that he lived at 813 E Street, S. W. for eighteen years, that he was at home on the evening of November 23rd, 1913, and sitting on the front porch a little
21 after six o'clock, about fifteen or twenty feet from *from* where the witness was sitting, one of the ladies fell, he ran out of the gate to see if he could lend any assistance to her, but she had gotten up before he got there.

Witness testified that the general condition of that sidewalk was very good, that he had never seen anyone else fall there besides Mrs. Chambers^m that he has seen George Biddle a blind man pass there, and his grandfather used the sidewalk every day.

Witness said that the street was well lighted and he never saw any place where the bricks stuck up as much as four inches, or any depressions as deep as four inches.

On cross examination witness stated that he had never seen any rain water collect on the pavement in front of 813 or 815 E Streets, Southwest. In answer to a question by the court the witness stated that from the alley west to 9th street there was a distance between fifty and sixty feet, that there are two houses one of them is a double house, that he lived at 813.

Second. RICHARD F. HARTNETT, testified that he lived at 813 E Street, Southwest and has been living there in that block for fifty years, that he always found the sidewalk in good condition and never saw any bricks raised up out of it a distance of four inches, or a hole in it as deep as four inches and that he never fell on any part of the sidewalk.

On cross-examination witness stated that the pavement had been renewed, and he saw no use for having the new sidewalk laid down, and that he was satisfied with the old pavement, because it looked — to him.

Third. Mrs. RICHARD D. HARTNETT, testified that she has lived at 813 E Street Southwest for the last twenty-six years, that the pavement was very good from the alley, to the corner and she never saw any holes in it that she paid any attention to it. If any of the bricks were raised up it was such a trifling affair that she never fell there.

On Cross-examination witness stated that she had seen water collect on the pavement in front of her house just as it collects in other places, on other streets, but that it was not enough to "drown anybody."

Fourth. Mrs. J. A. COMPTON, testified that she had lived at 501
22 8th Street southwest and kept a store at 900-E Street southwest. that the pavement from the alley west, on the north side of E Street between 8th and 9th Streets in November 1913, ap-

peared to be all right, that she never fell over it and that she never saw any pieces of bricks sticking up out of the sidewalk four inches high.

5. J. A. COMPTON, testified that he lived at 501 8th Street, southwest, and then kept a store at the corner of 9th and E Street. That he was familiar with the condition of the sidewalk on the north side of E Street down to the alley. That it was in good condition at the time and he never saw any bricks sticking up out of it four inches high, nor saw any holes four inches deep.

On Cross-examination witness stated that the pavement had been repaired, that it did not need to be repaired according to his view of it.

6. HENRY A. ALLEN, testified that he lived at 507-9th Street southwest and had lived in that part of the town about ten or fifteen years. That he was familiar with the pavement on the north side of E Street between 8th and 9th southwest, in November of 1913, and that its general condition was good. That he never saw any holes in the pavement, never saw any bricks sticking up four inches high out of the pavement, that he never knew Mrs. O'Connor or anyone else, falling on the pavement, before this case came up.

On Cross-examination witness stated that the District repaired the pavement not because there was any need but because it was time they were having some improvements. That they were putting concrete pavements down in that neighborhood and didn't want to skip that place. That the pavement was as good as any he had ever seen in Washington, and that it was in good condition.

— W. W. L. MORRIS, testified that he had lived at 466 9th Street Southwest, since 1868, that he passed over the pavement in question four or five times a day. That the pavement seemed to be in good condition, previous to November 1913 and that he had never fallen over it.

Wherefore *plaintiff* for the *counsel* interposed and objection to the testimony by the witness as immaterial, which objection was sustained by the court. That he did not remember ever seeing
23 any holes in the sidewalk and did not remember any bricks sticking up four inches high, though there might have been.

Upon Cross-Examination witness stated that he couldn't see out of his left eye at all, but could get around with his right eye. That the pavement seemed to be in good condition and the District put down a new pavement there because they were putting them down all around town and they thought that part of the city should have new sidewalks also.

8. GEORGE R. BIDDLE, testified that he lived at 476 M Street Southwest for a little more than a year prior to April 13, 1915, that he was blind and passed over the street in question and never discovered any holes or places where the bricks stuck up.

9. G. V. RECTOR, testified that he is an assistant engineer in the Surface Department of the District. That he made a map in February 1914, which was offered in evidence showing the north side of E Street southwest, between 8th and 9th Streets and that no change had been made in the street since November 1913. The map was made at the instance of the inspector in charge of this claim when notice came to him of the accident down there. That in a place which he indicated on the map in a distance of three or four feet there was a difference in the grade of five-eighths of an inch below the level and another point there is one five-eighths of an inch above the level and he found no place where the difference in the level was as much as four inches, and no depression as deep as four inches and from the alley to 9th street is one hundred and fifteen or one hundred and eighteen feet.

On Cross-examination the witness stated that the pavement was twelve feet wide and from the place where there was a tree box it was eight feet wide, and it was at least three feet from the center of the street to the tree box aperture.

Witness stated that his measurements had been made after the trees had been removed, which was done in January 1914, before the map was made, there were no tree boxes and no stumps. There were only the spaces where the trees had been and that he never saw the sidewalk when the trees were there as the trees stumps and bases had all been removed before he made the map.

24 Counsel for the plaintiff thereupon moved the court to exclude from the consideration of the jury the evidence given by this witness, based upon this map, but the court overruled the said objection and said evidence was permitted to remain in the case for the consideration of the Jury.

10. Mrs. ELEANOR E. GROVE, testified that she lives at 801 E Street southwest, was familiar with the pavement in question in the year 1913 and prior thereto, and passed over it three or four times a day. That its general condition was the same as to her as any other pavement, and she never saw any holes in it four inches deep or any bricks sticking up four inches.

11. J. S. PILCHER, testified that she lived at 523-8th St. Southwest. That she lived in the middle house on E Street, No. 815. That she is familiar with the sidewalk in front of that house, and does not recall seeing any holes in it four inches deep. That she swept off the sidewalk every night and morning. That she lived there six or eight months prior to November 23, 1913.

On Cross-examination she stated that she had seen a colored man fall in front of the house, but she thought he was drunk.

12. ALEXANDER THOMPSON, testified that he lived at 939 F Street Southwest, and that he is familiar with the pavement in question, and in November 1913 saw some one fall there. It was between six and seven o'clock and he was standing on the corner of 8th Street north side. Three women passed him and when they got near 9th

street he saw one of them go down, he saw a man running out to try to assist them, he said he then went on up the street to see what had caused the fall. Stated that the pavement was always in perfect condition and he had been around there for the past fifteen years.

On Cross-examination the witness stated that he was on the north-west corner of 8th and E Streets, that the trees were scattering on the north side and no limbs except on the top of the trees and he could see along the street plainly underneath the trees. The witness stated that the plaintiff fell between the trees, could not say positively because he went there about a half hour after it was over.

25 The trees were of ordinary size about as big as the post in the court house.

13. WILLIAM G. DAVIS, testified that he is a member of the Metropolitan Police Force, that the general condition of the pavement was good, and no report of the accident was made.

14. JOHN S. MILLER, also testified that he was a member of the Metropolitan Police Force, that his beat covered the pavement in question, and that he had been on the same beat for three or four years, and that the pavement was in good condition and no report was made of any accident.

15. Dr. EDWARD WARREN BURCH, testified that he had been practicing for ten years. He made an examination of Mrs. Chambers on December 18th, 1914, in the presence of Dr. Wilson, that Mrs. Chambers told him that she had fallen on the street, went to a friend's house after the fall, went home on the street car and did not see a physician for several days and then walked to the Doctor's office. That she had more or less trouble ever since. That he found varicose veins and innumerable scars, numbers of scars, from what she described as varicose ulcers that had occurred some five years previously.

Witness stated that Mrs. Chambers said that Dr. Wilson had treated her for these varicose ulcers. Witness stated that a severe sprain might occasion permanent injury and improper ability to walk, he said that he did not think the present condition of plaintiff was due to the injury but a combination of causes impairment of the circulation of her lower limbs, chief of the causes is varicose veins and cardiac insufficiency. The witness stated that the type of scars which he saw was due to ulceration and that this case was also eczematous, by that is meant redness exudation of lymph, hard inflammation of the skin.

On cross-examination witness stated that he had treated more than one hundred cases for varicose veins, he stated that he told Mrs. Chambers that she had varicose veins, and that the witness admitted it in the presence of Dr. Wilson, that he saw scars on her limb on the interior portion of the lower extremity between the knee and the ankle, that he probably saw five or six scars and that the scars that he saw would be there today. Witness afterward stated that he

26 would not say definitely that there were six, but he would say that there were several, meaning more than one, he finally said that he saw more than two. He said that nothing was said at this examination about the cartilage of the knee being injured. He said that one of these scars that he saw was the size of a half dollar perhaps larger, on the interior portion of the leg. He stated that the knee was normal so far as he could observe and there was no evidence of internal injuries. That Mrs. Chambers told him that there was pain in the knee, but he did not attempt to locate it, that he saw the varicose veins on her limb himself.

On redirect examination witness stated that if there had been an injury to the semi-lunar cartilage of the knee the patient could not have walked to the Doctor's office three days latter.

On recross examination witness stated varicose veins could not be cured with zinc ointment. That if varicose veins had been removed by a surgical operation there would be a linear, long like scar, that the scars he saw were coin shaped and round.

15. THOMAS J. FISCHER, testified as to the position of the lamps on the block. Said there were two lamps on the corner of 9th and E Streets, one on the northwest corner and one on the southeast corner, then there is one on the north side between 8th and 9th on the east side of the alley and at the point where the plaintiff fell, the nearest light would be about sixty-five feet away.

16. CLIFFORD LANHAN, testified that he is employed by the District Government, in the division of trees. He identified a lot of papers as being official records for the removal of trees on the north side of E Street between 8th and 9th Sts. Southwest. The trees were removed at two different times, in 1912 and in 1914. 1-2-3-4-7 and 8, were removed in May of 1912. No. 1 was at 8th street and No. 8 was at 9th street. They left Nos. 5 and 6, and they were removed in January of 1914. He stated that No. 6 was west of the alley, but was not certain whether No. 5 was east or west of the alley. That witness did not see bricks sticking up out of the sidewalk to the height of four inches. That this was after the trees were removed and the condition of the pavement was good.

27 Counsel for the plaintiff then moved the court to strike out the testimony of Mr. Rector, relative to the map, which he had made in February 1914, showing the condition of the street at that time, for the reason that it appeared that the map was made at a time subsequent to the removal of the trees. This motion was opposed by the counsel for the defendant, and the court refused to grant said motion, to which ruling of the court the plaintiff excepted and which exception was allowed by the court.

On cross examination witness stated that nos. 5 and 6 were the only trees that remained and they were removed on that day. In January 1914 the trees were placed about 25 feet apart.

Thereupon the plaintiff gave testimony in rebuttal as follows: She stated that she had never had any varicose veins never said she had,

and never told Dr. Burch she had been treated for them. That she had never been treated for varicose veins and none had ever been removed by an operation. That there was one scar on her left leg on the ankle. She had another scar that she had since a child. That the scar on her ankle — as big as a nickel, and was caused from scratching it, and the scar had been there for about seven years and had been cured by zinc ointment purchased at the drug store, and that prior to the accident she had had no difficulty in walking and her limb was not swollen neither were her knees. She stated that when she fell she fell right against the tree, and she considered it remarkable that she did not hit the tree when she fell, from the brick- that were raised up by the roots of the tree.

LILLIAN CECILIA BOYER says she remembers the sore on her mother's ankle, it was irritated and had been treated with a little zinc ointment. That she knows what varicose veins are and her mother never had any either seven years ago, or at any other time and she would have known it if she had them.

The foregoing is the substance of all the evidence in the case.

Thereupon the court granted three of the plaintiff- prayers and instructed the jury as follows:

28

Charge to the Jury.

The COURT (Gould, J.): Gentlemen of the jury, in this suit of the plaintiff, Celia Chambers, seeks to recover from the District of Columbia a sum not exceeding Ten Thousand (\$10,000) Dollars as compensation for the injuries which she alleges in her declaration she received by falling over an elevation in the sidewalk in front of premises No. 815 E Street, southwest, the allegation being that the sidewalk was in that condition as the result of the negligence of the officers and employees of the District of Columbia.

There are one or two general observations I wish to make in regard to the law of the case before reading the instructions that have been granted.

The District of Columbia, which is charged by law with the supervision of the streets and sidewalks of the city, is not an insurer of the safety of persons who walk upon the sidewalks or across the streets. It is under the obligation simply to exercise that degree of care in regard to that that an ordinary prudent man, being charged with the same duty, or being charged with the same responsibility, would exercise. I state that because it results from that that it is incumbent upon the plaintiff, in order to recover, to establish a failure to comply with that duty which is measured by the duty which an ordinary prudent man would be under, under the same circumstances.

Bearing that in mind, I give you the following instructions:

First. The jury are instructed as a matter of law that the defendant having charge over and supervision of the streets and sidewalks of the District of Columbia is bound to put and keep them in such condition and state of repair as to make all parts of said streets and

sidewalks reasonably safe for the kind of public travel for which they are respectively designed. It is not sufficient that such streets and sidewalks should be kept in such a condition as to be reasonably safe in daylight, but their condition must be such that they will be reasonably safe in all conditions of light and under all circumstances in which the public are entitled or compelled to use them, and if they

29 should find from the evidence that the sidewalk upon the northern side of E Street, southwest, in the city of Washington, in the District of Columbia, in front of premises No. 815 E Street southwest, was on the 23d day of November, A. D. 1913, in such a condition from an elevation in the sidewalk, due to the negligence of the defendant, its servants and agents, in permitting the roots of a tree to extend across and under said sidewalk in such manner at this place as to render the sidewalk unsafe for pedestrians, and that the plaintiff in the exercise of ordinary care was, in using said sidewalk, thrown to the street and injured, their verdict should be for the plaintiff for such damages as she sustained and alleged in the declaration, provided that they shall find that the District of Columbia, either had actual or constructive notice of the defective condition of said sidewalk which was the cause of the accident and failed to remedy the same.

Second. If the jury shall find from the evidence that on the said 23d day of November, A. D. 1913, there was an elevation or projection extending across the sidewalk in front of premises No. 815 E Street, southwest, in the city of Washington, in the District of Columbia, and if they further find from such evidence that such elevation or projection was of such nature as to be dangerous to persons passing along the street in the day or night time, then in determining whether or not the same was known to the defendant it is not necessary to find in the evidence actual notice to the defendant, but if such elevation or projection from its character, notoriety, or continuance for an unreasonable length of time, ought to have been known to the defendant corporation, by a reasonable inspection, then it is legal or constructive notice which should be imputed to the defendant if the elevation or projection was such that it could have been discovered upon inspection of the sidewalk made with reasonable care. If, therefore, the jury shall find from the evidence that the sidewalk remained in a dangerous condition so long that the authorities of the defendant corporation could not help in the exercise of reasonable care and diligence, such as a prudent man would exercise if he had charge of the streets or sidewalks, in knowing it, then the defendant

30 had notice in contemplation of law, which is constructive notice, and is liable for injuries occasioned to passersby who are injured in using the said sidewalk in the exercise of ordinary care.

That is a somewhat involved prayer, though probably containing a correct statement of the law. If I may perhaps put it a little more plainly to you, it is this: If a sidewalk (and I am going to confine my remarks to a sidewalk, because that is what is involved in this case) was originally constructed in a proper manner for the use of the traveling public, then the District would have fulfilled up to that

point, the duty which the law enjoins upon it. Now if that sidewalk became dangerous by reason of an elevation or depression, or in any other way, the District would be liable under two sets of facts:

First. If it had actual notice of the dangerous condition and failed to remedy it.

Second. If it had what it called "constructive notice." By "constructive notice," we mean this, that if that defective condition had continued there for any length of time or for a time so long that an ordinarily prudent man, having charge of the work of maintaining the sidewalks, ought to have ascertained its existence and failed to do so and permitted it to continue, then that would amount to constructive notice of the existing condition. So that in this case if you find that there was this dangerous condition of the sidewalk and find that it had continued so long that an ordinarily prudent man having charge of the sidewalk would have discovered it, then that amounts to notice to the District that it was in that dangerous condition.

There are, as you can see very readily, several questions of fact and the first and most important one is: What was the condition of that sidewalk at the time this lady fell, on the 23d day of November, 1913. * If it was not in a dangerous condition, then her fall would impose no liability upon the District; and it is for you to determine, first of all, what was the condition of the sidewalk on this 23d day of November, and that you will have to work out for yourselves from the testimony which is as conflicting as I ever heard in a case in court.

The next question is; Did the District have constructive notice; and I have explained to you how you are to arrive at it; that is, would an ordinarily prudent man, having charge of the
31 streets, have discovered this defective condition, if you find there was a defective condition, by reasonable inspection.

Now if you find for the plaintiff, the measure of her damages is stated as follows: The jury are further instructed that if they shall find from the evidence that the plaintiff is entitled to recover, then it will become their duty to assess from the evidence the damages which the plaintiff has sustained from the -jury complained of in the declaration. In fixing the amount of her damages, the jury will estimate and ascertain from the evidence such sum of money as will compensate her for the pain and suffering, mental and physical, caused to her by the said injury and they will include in the estimate of damages any injury to her knees of any permanent nature, such as the evidence may show to have been suffered by her.

I simply close by saying that the burden of proof is upon the plaintiff to establish her case by a preponderance of the evidence.

You may take the case.

The foregoing exceptions were separately reserved and entered by the presiding justice on his minutes before the jury retired to consider their verdict. The jury retired at 11.15 o'clock A. M. and not having reached a verdict were recalled at 1.15 o'clock P. M. That they reported to the court that they had not reached an agreement and were sent back by the court for fifteen minutes' further delibera-

tion. Whereupon the jury retired and within said fifteen minutes returned a verdict in favor of the plaintiff for one cent damages.

Counsel for the plaintiff now prays the court to sign and settle this bill of exception in order that it may be made part of the record which is accordingly done this 23d day of June A. D. 1915, now for them.

ASHLEY M. GOULD, *Justice*.

[Endorsed:] Celia Chambers vs. Dist. of Columbia. Bill of Exceptions. Michael C. O'Brien & Edward L. Gies, Attorney- and Counselor- at Law, 511-12 Wash. Loan & Trust Bldg., Washington, D. C., Att'ys for Appellant.

Endorsed on cover: District of Columbia Supreme Court. No. 2847. Celia Chambers, appellant, vs. The District of Columbia, &c. Court of Appeals, District of Columbia. Filed Jun- 29, 1915. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP.-9--1915

IN THE *Henry W. Hodges*
Clerk

Court of Appeals of the District of Columbia

No. 2847.

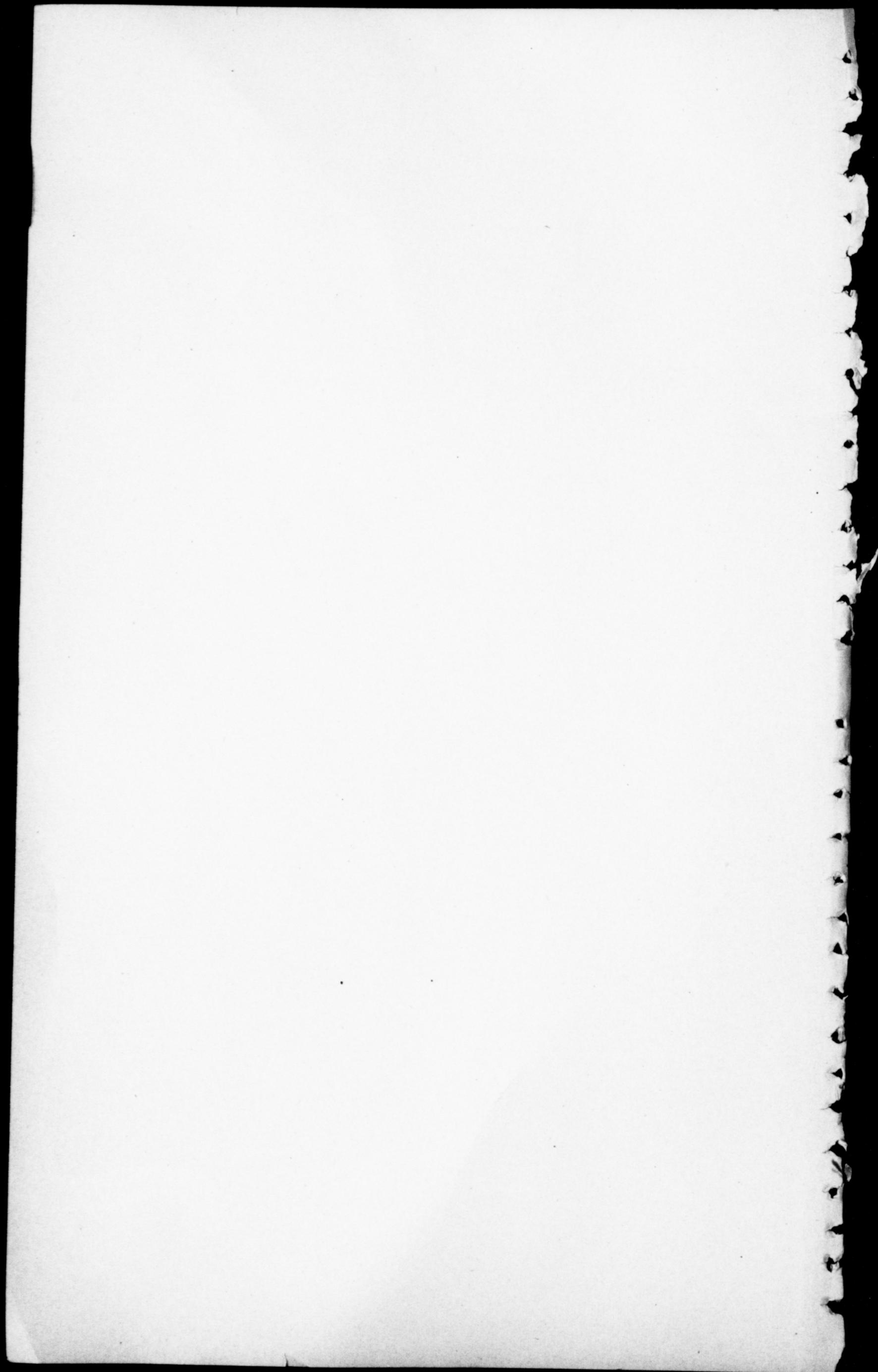
CELIA CHAMBERS, APPELLANT,

VS.

DISTRICT OF COLUMBIA, A MUNICIPAL COR-
PORATION, APPELLEE.

MICHAEL C. O'BRIEN,
EDWARD L. GIES,
Counsel for Appellant.

PRESS OF H. B. DARLING



IN THE
Court of Appeals of the District of Columbia

No. 2847.

CELIA CHAMBERS, APPELLANT,

VS.

DISTRICT OF COLUMBIA, A MUNICIPAL COR-
PORATION, APPELLEE.

STATEMENT OF THE CASE.

The appellant, Celia Chambers, the plaintiff in the Court below, sued the defendant for damages, to compensate her for the injuries which she sustained by falling over an elevation in the sidewalk on E Street, S. W., between 8th and 9th Streets, in the City of Washington, in the District of Columbia, on the 23d day of November, 1913, about 6.45 P. M.

The evidence produced on behalf of the plaintiff was that an elevation ran across an old brick sidewalk, which existed in this street at that time, to the height of about four inches. There was also a depression adjacent to this elevation of several inches more. The elevation began at the root of a tree in front of 815 E Street, extended in a northerly

direction across the sidewalk for about three or four feet and was apparently caused by the roots of a tree pushing up the bricks in the sidewalk so that they formed an arch which rendered the use of the sidewalk dangerous. Appellant testified that on the evening in question she was going west upon the sidewalk upon the north side of E Street, and when opposite the said premises, fell over this obstruction and sustained severe injuries. That she sprained her left hand and left knee severely; broke her teeth and scratched her chin and forehead. That both her knees were scratched and black and blue. That since the accident she had not been able to walk normally, as she had prior thereto. That she was internally injured and had a very bad case of bladder trouble in consequence of her fall. That she was unable to stand or walk and was obliged to sit down to whatever she did and that she had none of this trouble prior to the accident.

Dr. L. D. Wilson corroborated the appellant and stated that on the 26th day of November, 1913, he found both knees bruised, swollen and sprained. That he found looseness of the semi-lunar cartilage. That Mrs. Chambers complained of her back being wrenched and torn and he found sensitiveness to the touch in the region of the spine. That the trouble with Mrs. Chambers' knees was that she sprained them and that the sprained condition continued until the time of the trial, and the injury to the knees was permanent. That he found no evidence of the injuries being the result of varicose veins. That he never treated her for varicose veins and there were none on her limbs so far as he knew.

The plaintiff was corroborated by a number of witnesses who testified as to the dangerous character of the pavement at this place its long continued existence prior to the accident to appellant and that others had fallen there.

Mrs. Cecelia Boyer (see R. p. 12) testified that since the accident of November 23, 1913, her mother had not passed a day without suffering. That she was unable to do

ordinary work, could neither stand nor walk with comfort and whenever she undertook to do anything had to take a chair and sit down to it. That the limping of her mother was the result of the accident and that even at the time of the trial she was obliged to rub her knees at least every other night with olive oil to loosen them up and give her relief, and that she seemed to be suffering all the time.

Mrs. Janet Snape (see p. 9) testified that she was a registered nurse and chiropractor and that she had treated Mrs. Chambers for a derangement of the knee and trouble with the spine.

The Court instructed the jury in substance that if they found the condition of the pavement was, as testified to by the plaintiff, and that the District had knowledge of its condition either actual or by construction or implication of law, their verdict must be for the plaintiff and the Court further instructed the jury in the following language:

“That if they shall find from the evidence that the plaintiff is entitled to recover, then it will become their duty (see p. 20) to assess from the evidence the damages which the plaintiff has sustained from the injuries complained of in the declaration; and in fixing the amount of damages the jury will estimate and ascertain from the evidence such sum of money as will compensate her for the pain and suffering, mental and physical, caused to her by the said injury, and they will include in the estimate of damages any injuries to her knees of a permanent nature, such as the evidence may show to have been suffered by her.”

The jury retired at 11.15 o'clock A. M., were recalled at 1.15 P. M., for the purpose of ascertaining whether they had reached a verdict and then sent back for fifteen minutes' further deliberation, with instructions to return a verdict at that time if they could agree on any. Whereupon the jury retired and within the said fifteen minutes brought in a verdict for the plaintiff, for one cent damages.

ASSIGNMENT OF ERRORS.

The appellant assigned two errors, one upon the part of the Court in admitting in evidence, a map of the street made by one George V. Rector, in February of 1914, three months after the accident occurred, after the trees upon the street had been removed and the level of the pavement had necessarily been changed.

The second assignment of error was because of the refusal of the Court to set aside the verdict as being contrary to the evidence against the weight of the evidence, because the damages awarded were inadequate and because the verdict as rendered was contrary to the instructions of the Court. We consider first the assignment relating to the verdict.

ARGUMENT.

The Court erred in not promptly setting aside the verdict of the jury for one cent and in not granting a new trial to the plaintiff. This verdict should be set aside for three reasons:

FIRST: That the amount of damages awarded is inadequate.

SECOND: That the verdict is contrary to the evidence and against the weight of the evidence.

THIRD: That the verdict is contrary to the instructions of the Court.

From the evidence in this case it very clearly appears that the plaintiff is entitled to recover substantial damages. The jury's verdict is an adjudication of her right to recover and, having found the verdict in her favor as to the defective condition of the sidewalk and constructive or actual notice to the defendant, it was the duty of the jury to award her a verdict for substantial damages.

In the 14 Vol. Am. & Eng. P. & P., page 764, it is stated that where the plaintiff is entitled to recover substantial damages if entitled to recover at all, a verdict for nominal damages will be set aside and a new trial granted.

In the case of *Miller vs. Delaware, etc., R. Co.*, 58 N. J. L., 428, it was held that where the plaintiff is entitled to substantial damages for personal injuries a verdict for six cents is so contrary to and inconsistent with the evidence that a new trial will be granted at the instance of the plaintiff.

To the same effect are the cases of *Lough vs. Romaine*, 36 N. Y. Super. Ct., 332.

Robbins vs. Hudson River R. Co., Bosw. (N. Y.), page 1.

Moseley vs. Jamison, 68 Miss., 336.

Bradwell vs. Pittsburgh, etc., Pass. R. Co., 139 Pa. St., 404.

The law in England appears to be to the same effect. In the case of *Armytage vs. Haley*, 4 Q. B., 917, it was held that a verdict for but one farthing damages should be set aside where it appeared that the plaintiff's thigh had been broken and that he had paid ten pounds for surgical attention.

In the case of *Taylor vs. Howser*, 75 Ky., 466, the Court said:

"When the action of the jury is such as to demonstrate that as to the damages the proof was disregarded and the law of the case as embodied in the instructions of the Court disobeyed, then a new trial may and ought to be granted."

In this case the Court properly instructed the jury that if they believed the shooting to be without justification or excuse, they should give to the plaintiff in the way of damages the value of his services, during the time he was disabled by his wounds, and the amount he reasonably expended for medicine and medical attention in effecting his cure.

As to the matter of special damages the proof was clear, consistent and conclusive. By finding one cent in damages, the jury disregarded the proof and disobeyed the positive and peremptory instructions of the Court. The judgment of the Court below, overruling a motion for a new trial, is reversed.

To the same effect are the cases of *Brown vs. Hickie*, 68 Iowa, page 333, and *Higgins vs. Lee*, 16 Ill., 495.

The Federal Courts have sustained the same proposition in the case of *Carter vs. Wells Fargo Co.*, 64 Federal R., 1005.

The Court said this is an action by James A. Carter against Wells Fargo Co., for damages for personal injuries. The jury gave a verdict for the plaintiff for one dollar damages. Judge Ross said where in an action for personal injuries the jury finds in effect that the plaintiff has been injured through the negligence of the defendant without any contributory negligence on his own part, and the evidence without conflict shows that his injuries were substantial, yet the jury awards him practically no damages at all, the verdict will be set aside and a new trial awarded.

See also—

Gaither vs. R. R. Co., 27 Fed. R., 545.

Field on damages, page 886.

Sedgwick on damages, Vol. 2, page 656.

Where a reasonably certain measure of damages is afforded the Court will look into the circumstances of the case and correct a verdict according to justice and will set aside the verdict if too small damages are given.

Bishop vs. City of Macon, 7 Ga., 200.

When the jury find a verdict in favor of plaintiff, which determines issues in his favor that entitle him to substantial

damages, but only nominal damages are awarded, it is not error to set aside the verdict.

Conrad vs. Dobmeier, 57 Minn., 147-58 N. W., 870.

A new trial will be granted where the measure of damages has been clearly laid down and has been disregarded by the jury.

Hoffman vs. Bosch, 18 Nev., 360.

A verdict may be set aside on the ground that the damages are inadequate.

McDonald vs. Walter, 40 N. Y., 551.

A new trial will be granted where it clearly appears that the plaintiff is entitled to greater damages than were awarded.

Black vs. Drake, 2 Colo., 330.

Plaintiff, a girl of ten years, fell, owing to a defective sidewalk, broke her ankle and causing much suffering and permanent injury; a verdict was recovered against defendant city for One Dollar; held that the award of so small a sum shocked the understanding and compelled a new trial.

Fairgrieve vs. City of Moberly, 29 Mo. App., 141.

Where the amount awarded is so small that it is evident that the jury must have overlooked some material element of damages that courts have extended relief. The usual method is to set aside the verdict as being inadequate under the circumstances and to grant a new trial.

Henderson vs. St. Paul, etc., R. Co., 52 Minn., 479.

Donovan vs. Gay, 97 Mo., 440.

Smith vs. Dittman, 16 Daly, 427.

Whitney vs. Milwaukee, 65 Wis., 409.

Again a verdict will be set aside if it is contrary to the instructions of the Court (see Vol. 14, Am. & Eng. Ency. of P. & P., p. 786). Since the jury is bound to follow the law of the case as stated by the Court, a verdict will be set aside if it is clearly contrary to the instructions.

Cunningham vs. Magoun, 18 Pick (Mass.), page 13.

Accordingly, if it appears that the jury has disregarded the instructions of the Court, the judgment will be reversed.

See—

Thornton vs. Lane, 11 Ga., 495.

Union Pacific R. R. Co. vs. Hutchinson, 40 Kan., 51.

Ryan vs. Tudor, 31 Kan., 366.

Dutton vs. Wabash, etc., R. Co., 66 Iowa, 352.

Nichols vs. Chicago, etc., R. R. Co., 69 Iowa, 154.

A verdict that is contrary to instructions will be set aside.

N. O. J. & G. N. R. Co. vs. Enochs, 42 Miss., 603.

Thompson vs. Lee, 19 S. C., 489.

When the jury find a verdict contrary to the charge of the Court a new trial will be granted.

Tyler vs. Gray, 9 Ga., 408.

Ross' Lessee vs. Eason, 1 Yeates (Pa.), 14.

Where a verdict for plaintiff could not have been arrived at without disregarding one of the instructions, it is error to refuse to grant a new trial on defendant's motion.

Bushnell vs. Chicago N. W. R. Co., 69 Iowa, 620.

Furthermore, the verdict as rendered by the jury of one cent damages shows a compromise of a most objectionable character, and is therefore one that should be promptly set aside by the Court. In this case the jury were out for about two hours and when called before the Court stated that they could not agree. They were then directed to retire

for fifteen minutes additional and feeling that they were obliged to return a verdict at that time the objectionable verdict was rendered.

Though the general rule is that the verdict is conclusive on a question of fact where the evidence is conflicting, yet where it is apparent that the Jury could not have agreed on so insignificant a sum as damages, except by a compromise of the most objectionable sort, their verdict is properly set aside.

O'Shea vs. McLear, 48 Hun., 619.

Gartner vs. Saxon, 19 R. I., 461.

See Taylor vs. Jones, 2 Head (Tenn.), 565.

The second assignment of error is the introduction by the defendant over the objection of counsel for the plaintiff of a map made in February, 1914, by one George V. Rector, an assistant engineer in the Surface Department, of the District, which was admitted in evidence showing the north side of E Street, between 8th and 9th Streets, Southwest. The object of using the map was to endeavor to show that there was no elevation in the pavement, caused by the pushing up of the bricks by the roots of the tree, in the neighborhood of where the tree known as No. 6, being the one in front of 815 E Street, was located.

Clifford Lanham (R. p. 17) testified that he was employed by the District Government in the division of trees and that he removed the tree, the roots of which caused the elevation in the pavement in the month of January, 1914, two months subsequent to the accident.

Mr. Rector (R. p. 15) testified that his measurements had been made after the trees had been removed, which was done in January, 1914, and that trees, stumps and bases had been removed before he made his measurements and the map. This would necessarily imply that the pavement had been readjusted to suit the new condition arising after the tree had been removed and the roots taken up. Measure-

ments, therefore, made by the witness at this time, could not show the condition of the street in November, 1913. The plaintiff moved to strike out all the evidence of Mr. Rector relative to the map and the map itself, which motion the Court refused to grant, and plaintiff was allowed an exception. The inadmissibility of the map in evidence is based on the fact that it was made three months after the accident, and without proof to establish the fact that the condition of the street had undergone no change. Its inadmissibility is clearly established by the ruling of the Court in the following cases: In the case of *Hampton vs. The Nor. & W. R. R. Co.*, 120 N. C., 534, the Court said:

“Where in the trial of an action for injuries it became material to show the location of a path existing two years before the trial at the time of and on the lot where the accident occurred, there was evidence of changes in the situation and that the lot had been fenced shortly after the accident, a photograph of the location taken just before the trial was properly rejected as evidence, it being inadmissible whether offered as substantive evidence or as an authorized map.”

The law relating to the introduction in evidence of photographs and unofficial maps is the same.

In the case of *Cleveland C. & C. St. L. R. Co. vs. Monaghan*, 140 Ill., page 475, it was held that in an action against a railroad company to recover damages for negligence resulting in the death of the plaintiff's intestate at a highway crossing, in which the leaving of cars standing on the side tracks so as to obstruct the view of approaching trains, was claimed as a ground of negligence, the defendant offered in evidence photographic views of the locality where the accident happened, taken by an amateur artist some two months thereafter. The party who took such views had never visited the scene of the occurrence before, and there was no proof that they correctly represented things as they were

when the accident happened. Held, no error in the Court to refuse to admit them in evidence.

Also in the case of *Chicago & Alton R. Co. vs. Corson*, 198 Ill., 103, the Court said: The appellant offered in evidence photographs which were rejected by the Court, of the scene of the accident, which were taken nine months after the accident took place, and at a time when the evidence showed that the natural surroundings had been changed. The Court said it is not error to exclude photographs taken a long time after the accident where the situation has changed. We think the action of the Court in rejecting said photographs was proper.

Also in the case of *The Chicago & Eastern vs. Illinois R. Co.*, 214 Ill., page 689. The Court said photographs offered in evidence for the purpose of contradicting witnesses or explaining a transaction are only competent when they are shown to have been so taken as to correctly exemplify the actual situation, circumstances and surroundings at the time when the situation and surrounding circumstances are subject to no change.

Photographs to be of any value as evidence must be shown to have been taken at the time, or when the situation and surroundings are unchanged.

See the *Iroquois Furnace Co. vs. McCrea*, 191 Ill., 340.

In conclusion, counsel for appellants submit that the judgment of the Court below, overruling the motion for a new trial should be reversed and a new trial granted, for two reasons:

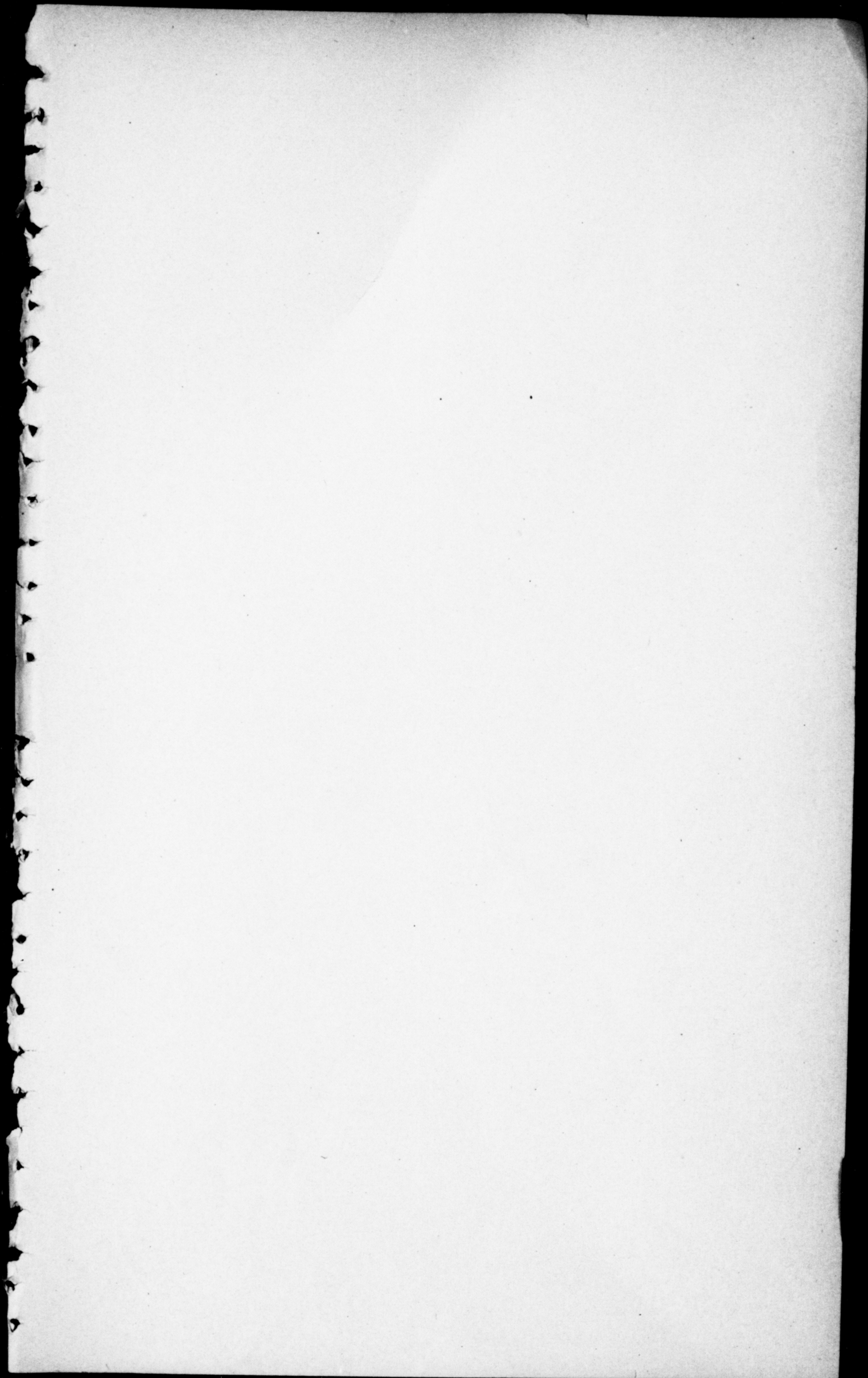
FIRST: That the map offered in evidence over the objection of the plaintiff is inadmissible, as it was made three months after the accident and without proof that the condition of the street was unchanged at the time it was made, and furthermore the testimony of the witnesses for the defendant showed that the condition of the street had been

changed in a material manner between the time of the accident and the time when the map was made.

SECOND: The verdict was a compromise verdict of the most objectionable character and awarded merely nominal damages when the proof entitled the plaintiff to recover substantial damages and was directly contrary to the third instruction asked for by the plaintiff and granted by the Court.

For these reasons we submit that the appellant should be granted a new trial.

MICHAEL C. O'BRIEN,
EDWARD L. GIES,
Counsel for Appellant.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 2 - 1915

Henry W. Holmes
Clerk

Court of Appeals, District of Columbia.

OCTOBER TERM, 1915.

No. 2847.

CELIA CHAMBERS, APPELLANT,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

CONRAD H. SYME,
ROGER J. WHITEFORD,
Attorneys for Defendant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1915.

No. 2847.

CELIA CHAMBERS, APPELLANT,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

Statement of the Case.

The statement of appellant's brief is substantially correct as to the location of the alleged obstruction in the sidewalk. Plaintiff testified that she did not examine the place where she fell at the time of her falling, but went back three or four weeks afterwards, and said that she saw a place where the bricks were elevated, which she presumed was caused by the roots of a tree near by. One of her companions testified that she did not examine pavement until some time afterwards and that she then found an elevation, which she supposed was caused by roots of the trees. Plaintiff's other companion was not produced at the trial. Plaintiff's wit-

nesses maintained that the elevation was four inches, alongside of which was a depression of four inches, making an obstruction eight inches above the level of the pavement. Plaintiff, with reference to her injuries, said that she sprained her left hand and knee, broke her teeth, and cut her chin and forehead. Her doctor testified that her knees were bruised and sprained and that he found a misplacement of the semi-lunar cartilage.

Defendant produced twelve witnesses, who testified as to the safe condition of the street at the place where plaintiff claims she fell, and who testified that there was no appreciable elevation or depression in the sidewalk at that place. A physician testifying in behalf of the defendant, after an examination of the plaintiff, said that her physical incapacity and suffering was due to varicose veins, and not to any injury received by her in falling. He further testified that plaintiff herself had admitted to him that she had been treated by her physician for varicose ulcers, and that examination of the plaintiff disclosed evidence of this treatment.

ARGUMENT.

The first assignment of error alleged by the appellant is that the verdict of one cent damages awarded by the jury is inadequate.

An examination of the record discloses that the plaintiff's case is characterized by exaggeration, both as to the obstruction in the sidewalk and as to her injury. The plaintiff contended that her present condition was due to the injury suffered by her at the time of her fall. Two witnesses, who actually saw her fall, testified that she did not stop, but arose immediately and went on her way, apparently uninjured. Her own testimony is that it was as much as two weeks before she went back to look at the place where she fell, and that although she fell on the twenty-third of November, she did not see a doctor until the twenty-sixth, and was able to

walk to his office, several squares away. The doctor for the District of Columbia testified that the plaintiff had told him that she had had varicose veins and had been treated for them by her physician, and that he saw evidences of varicose ulcers, and testified that in his opinion her present condition was due to cardiac insufficiency, and impairment of circulation and varicose veins, none of which were produced by her fall. Plaintiff did not call Dr. Wilson in rebuttal on the question of varicose ulcers, but he admitted in his cross-examination that it was possible that Mrs. Chambers had varicose veins, but he did not recall them. It is clear, therefore, that the jury believed the testimony of the defendant rather than that of the plaintiff and were not impressed by the attempts made by the plaintiff to magnify her injury. This, of course, they had a right to do. That the plaintiff fell on the sidewalk, there is no doubt, but the jury were not willing to believe that she was injured to any appreciable extent thereby.

On the question of an obstruction in the streets sufficient to cause her fall there was a division of opinion between witnesses for the plaintiff and those for the defendant. It would seem clear, therefore, that the jury believed the testimony of all of the witnesses to the extent that they admitted that she fell on the street, but doubted the sufficiency of the depression to cause her injury, and did not believe that she was injured to the extent claimed by her in her testimony. It is submitted, then, that damages of one cent were proper compromise by the jury.

In the case of *Lovett vs. Chicago*, 35 Ill. Apps., 570, in discussing a nominal verdict, the court said:

“The refusal of a new trial to the plaintiff, in a suit brought against the municipality to recover for personal injuries alleged to have occurred through its negligence, upon the ground that the verdict in his favor was inadequate will not be disturbed merely on the strength of such inconsistency.”

In the case of *O'Malley vs. Chicago City Railway Company*, 30 Ill. Apps., 309, the court said:

"The plaintiff, who is not entitled to recover at all, has no right to have a verdict in his favor set aside on the ground that it is for too small an amount. Where the plaintiff under such circumstance has appealed, the defendant having entered no motion for a new trial, the judgment will be affirmed."

In the case of *Hubbard vs. Mason City*, 64 Iowa, 245, where the jury found a verdict in favor of the plaintiff for \$1, the court said:

"The case is entirely different from an action for a liquidated sum of money, where the party is either entitled to a verdict for a definite amount or not entitled to anything. It is very evident that the jury in this case did not believe that the plaintiff was entitled to damages. If they did so believe they would have given more than a nominal sum. The verdict is really equivalent to a finding that he was not entitled to recover, and such finding is supported by the evidence, because we think that the evidence shows that he was not entitled to recover."

In the case of *Young vs. Great Northern Railway Company*, 80 Minn., 123, the court said:

"It does not follow that the court was required to grant a new trial because the damages did not equal the actual pecuniary injury sustained. Had the verdict been for a sufficient amount of money, and had the defendant asked that it be set aside because it was not supported by the evidence, and had the court sustained this motion and granted a new trial, its action would have been promptly sustained by this court. * * * So, if the court below was of the opinion, and it might well have been of such opinion, that the plaintiff was not entitled to any verdict under the evidence, the ruling was correct and it stands approved."

In the case of *Reading vs. Texas and Pacific Railway Company*, 4 Fed., 134, the court said:

"Now the jury erroneously have found a verdict for a sum less than the plaintiff would have been entitled to recover if his case had been made out by satisfactory proof. But this is not prejudicial to the plaintiff. It does not do him any wrong. He has no right to complain. We did not sit here to correct former errors made by the jury that did not hurt anyone. The parties who are injured by this verdict are the defendants not the plaintiff, but the defendants do not move for a new trial. THE JURY MIGHT HAVE FOUND A VERDICT GENERALLY FOR THE DEFENDANTS, BUT BECAUSE THE JURY HAVE GIVEN THE PLAINTIFF WHAT HE IS NOT ENTITLED TO IT CERTAINLY DOES NOT LIE IN THE MOUTH OF THE PLAINTIFF TO ALLEGE ANY WRONG NOR IS IT THE DUTY OF THE COURT TO SET ASIDE THE VERDICT."

In the case of *Simrall vs. Morton*, 12 Southwestern, 185, the court said:

"The inquiry being, why did the jury return a verdict for one cent only, is answered by reference to the testimony that conduces strongly to establish the defense; while on the other hand, if the value of the services rendered by the appellant had been the only issue, the finding of the jury would have been flagrantly against the testimony, and a new trial would have been granted."

In the case of *Haven vs. Missouri Railway Company*, 155 Mo., 216, the court said:

"The plaintiff is not entitled as a matter of law to have a verdict for nominal damages set aside by the appellate court, UNLESS HIS CASE IS SUCH THAT IF THE VERDICT HAD BEEN FOR THE DEFENDANT HE WOULD HAVE BEEN ENTITLED TO HAVE IT SET ASIDE."

In the case of *Wavle vs. Waverly*, 9 Hun., 125, speaking of nominal damages the court said:

"The amount of damages to which the plaintiff was entitled, was not fixed, definite, or certain, nor was it capable of being made so by any process of computation. The damages are wholly in the discretion of the jury and not controlled as to the amount by any evidence given at the trial. The appearance, character, and conduct of the parties and witnesses, or probabilities warranting the transaction, and the nature of the injury done, all constitute elements to be considered by the jury. This has been done with the result seen. Whether such verdict is the result of a compromise of differences among jurors, or whether it expresses the judgment of each juror, we cannot tell. Ordinarily such verdicts are deemed expressions of the jury that each party is more or less in fault and neither shall profit thereby. * * * So, when such a case has been once fairly tried and considered by the jury, its decision ought generally to be conclusive and final. Further litigation will but aggravate resentments, increase the cost and expenses, and still more tarnish the reputation of all concerned."

In *Mosely vs. Jamison*, 68 Miss., 336, it was held:

"But where there is no standard for measuring damages and no certain rule can be prescribed for the guidance of the jury, the court will not ordinarily grant a new trial, though the damages awarded him be manifestly small, unless the inadequacy was plainly produced by prejudice or passion or other improper motives."

In *Lancaster vs. Providence Steamship Company*, 26 Fed. Rep., 233, the court said:

"A verdict in an action for damages for personal injuries should not be disturbed, though the court may regard it as inadequate, unless it is shown that the jury were actuated by passion, prejudice, or corrupt motives, or that they made an important and manifest mistake."

In Southerland on Damages, vol. 2, page 1245, we read as follows:

"Where there is not a legal measure of damages and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not ordinarily interfere with the verdict. It is the peculiar province of the jury to decide such cases under proper instructions from the court and the law does not recognize in the latter the power to substitute its own judgment for that of the jury."

Again, on page 1248, we read:

"In cases where there is no legal standard of damages, if the appellate court does not find error in the admission or rejection of evidence, or in the instructions, the objection that the amount awarded by the jury is excessive or insufficient is not generally available."

In Phillips *vs.* Phillips, 34 New Jersey Law, 208, the court laid down the rule to be as follows:

"The rule as to the amount of damages in such cases is that the plaintiff is entitled to substantial compensation, and in case of trivial injury, or without any actual injury, to merely nominal damages."

In Donaldson *vs.* Cothran, 60 Ga., 603, the court said:

"If it be found by any one calculation authorized by law and evidence, whether it be the same adopted by the jury or not, the verdict can be sustained then this court will not control the discussion of the presiding judge in overruling a motion for a new trial."

In Prichard *vs.* Hewett, 91 Mo., 552, the court said:

"It was their exclusive province to weigh the evidence and pass upon the credibility of the witnesses. They, and the learned judge who refused to grant a new trial, had better opportunities of seeing the transaction in its true light and color, than we have in the record before us. Nevertheless, in that regard, we

can see how the jury might have found from the evidence that although the defendant was not justified in his action yet that the plaintiff was also without fault and came to the conclusion that under all of the circumstances it was not a case for substantial damages."

From a perusal of the foregoing citation and numerous others in the book it is clear that no error was committed by the trial court in overruling the motion for a new trial on the ground of inadequacy in damages, and as the testimony might well support a verdict for the defendant on the ground that the sidewalk was in a safe condition for travel, it is submitted that the jury were justified in their finding.

Second Assignment of Error.

Complainant contends that the trial court committed error in admitting a map made February, 1914, by an engineer of the surface department of the defendant. The accident happened to the plaintiff in November, 1913. The defendant proved that *there had been no change in the surface of the street between the time of the accident and the taking of the measurements preparatory to making the maps in February, 1914.* It is true there was testimony that some trees had been removed along the sidewalk in question, and it was proven that no change was made in the surface of the sidewalk by the removal of these trees, and in fact the tree department had nothing to do with the surface of the sidewalk and in no way altered the sidewalk by removing the trees. It is clear, therefore, that there was no change in the condition of the sidewalk between the time the plaintiff was injured and February, 1914. The map, therefore, and the testimony of the engineer were admissible under the authorities.

Appellant quotes in his brief case of *Iroquois Furnace Co. vs. McCrea*, 191 Ill., 340: "Photographs to be of any value as evidence must be shown to have been taken at the time,

or *when the situation and surroundings are unchanged.*"

The evidence in the case at bar meets the test of the above opinion. In the 6th volume, Encyclopedia of Evidence, page 502, in speaking of this question, the following language was used:

"A photograph of the place where the accident happened is admissible in evidence, even though there has been a change in the *locus in quo* before the taking thereof, if the nature of such changes is properly proved."

In the case of *Beardslee vs. Columbia Twp.*, 188 Pa., 496, the court spoke as follows:

"In photographs, as in plans, maps, or other drawings used as evidence, there ought to be substantial identity in the person, place or thing photographed and that which the jury are to consider in the case. But photographs of the scene of an accident taken at or near to the time are not always obtainable; and, bearing in mind the object sought—the assisting of the jury by knowledge of the locality, to judge the conduct of the parties with reference to the issue raised—the only practicable rule would seem to be that the changes must not be such as to destroy the substantial identity, and that the changes, whatever they are, must be carefully pointed out and brought to the jury's attention. This would have to be the course pursued if a view were allowed to the jury at the trial, and no other appears practicable in regard to plans, photographs, or other substitutes for a view. With these safeguards the subject must be left largely to the discretion of the trial judge."

In the case of *Glazier vs. Hebron*, 62 Hun., 137, court said:

"The photograph of the place where the accident occurred, although taken subsequently and after the fence had been erected at the place was no evidence of negligence on the part of the public authorities."

In the case of Harford County Commissioners *vs.* Wise, 71 Md., 43, it was held that it was not error to admit in evidence a sketch or drawing of the location of a bridge in the adjacent county, although the drawing was made by an artist who had never seen the bridge.

In the case of Tracy *vs.* B. & O. Railroad Co., 98 Fed., 633, case in which the question at issue was the condition of a jetty three months before it was subject to change in its condition by reason of the deposit of mud against one of its sides, the court held, although the continual deposit of this mud might change its condition, yet the photograph taken in June was competent to show its general condition the preceding March.

In Barker *vs.* Perry, 67 Iowa, 146, it was held that a photograph of a defective sidewalk on which the person was injured was admissible to show the condition of the walk where there is proof the condition had been changed from the time of the accident and the taking of the picture.

In conclusion, therefore, counsel for appellee submitted that the ruling of Justice Gould in the court below in admitting the map and testimony of the engineer was in accordance with the law and there was no error therein.

The verdict, therefore, being fairly arrived at by the jury after a consideration of all the circumstances of the case under proper instructions by the court, should be affirmed.

CONRAD H. SYME,
ROGER J. WHITEFORD,
Attorneys for Defendant.

